

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES	)	
COMPANY FOR CERTIFICATES OF PUBLIC	)	
CONVENIENCE AND NECESSITY AND	)	CASE NO.
APPROVAL OF ITS 2011 COMPLIANCE PLAN	)	2011-00161
FOR RECOVERY BY ENVIRONMENTAL	)	
SURCHARGE	)	

O R D E R

The matter is before the Commission upon a petition filed by Rick Clewett, Raymond Barry, Sierra Club, and the Natural Resources Defense Council ("NRDC") (collectively "Petitioners") seeking full intervention in the instant proceeding. Petitioners seek full intervention "to ensure that their interests in lower cost and cleaner energy options are fully represented, and to bring to this proceeding their expertise in developing plans for providing a lower cost and cleaner energy future." For the following reasons, the Commission will grant the petition.

BACKGROUND

On June 1, 2011, Kentucky Utilities Company ("KU") filed an application seeking Commission approval for Certificates of Public Convenience and Necessity ("CPCN") to construct particulate matter control systems to serve all the generating units at the E.W. Brown Generating Station and the Ghent Generating Station.<sup>1</sup> KU states that the

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<sup>1</sup> Louisville Gas and Electric Company ("LG&E"), KU's sister company, filed a similar application docketed as Case No. 2011-00162, Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge.

projects are required to comply with the federal Clean Air Act as amended, the proposed Clean Air Transport Rule, the proposed National Emission Standards for Hazardous Air Pollutants, the Resource Conservation and Recovery Act, and other environmental requirements that apply to KU facilities used in the production of energy from coal, including the U.S. Environmental Protection Agency's proposed regulation concerning the storage of coal combustion residuals. KU's application also requested approval of an amended compliance plan for purposes of recovering the costs of new pollution control facilities through KU's environmental surcharge tariff.

Messrs. Clewett and Barry are customers of KU and members of the Sierra Club. The Sierra Club is a national conservation organization with chapters in all fifty states, including the Cumberland Chapter in Kentucky. The NRDC is a national non-profit environmental organization based in New York, with a Midwest office in Chicago, Illinois. According to the petition, the NRDC's mission is to protect air and water quality, as well as promoting energy efficiency and renewable energy resources. NRDC notes that it has 2,942 members in Kentucky, many of whom reside in KU's service territory and/or live near KU's existing power generating facilities.

Petitioners state that they have a special interest in the instant proceeding that is not otherwise adequately represented. Messrs. Clewett and Barry maintain that, as customers of KU, they help fund KU's operations and the pollution control facilities proposed herein, if approved, would have a direct impact on their KU electric bills. The individual petitioners also state that they "are impacted by the economic, public health, and environmental effects of the resource decisions that KU makes."

The Sierra Club and NRDC state that they have members who are KU customers and share the same interests as Messrs. Clewett and Barry. The Sierra Club and NRDC assert that they, therefore, have the same interest as their members. In addition, the Sierra Club and NRDC point out their desire to promote energy efficiency, peak demand reduction, renewable energy, and cost-effective low-carbon energy resources in Kentucky is directly related to the issues in the instant proceeding. The Sierra Club and NRDC further maintain that their interest cannot be adequately represented by the Attorney General ("AG"). They note that the AG's responsibility is to represent the overall public interest of consumers, but Petitioners' interest is narrower and reflects a "concern in ensuring that compliance with emerging federal regulations is not piecemealed and complete costs associated with each alternative are adequately presented to the Commission."

The Sierra Club and NRDC assert that they have developed specific subject-matter expertise in the areas of energy and the environment. They note that their staff and consultants have "extensive expertise in resource planning, analyzing the potential for cost effective energy efficiency, and in the laws and regulations regulating energy production." The Sierra Club and NRDC contend that their expertise would allow them to present issues or develop facts that would assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

KU and LG&E filed a joint response,<sup>2</sup> contending that the Individual Petitioners

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<sup>2</sup> The Sierra Club and NRDC, along with three individuals, Drew Foley, Janet Overman, and Gregg Wagner, have also filed a motion to intervene in Case No. 2011-00162. The five individuals seeking to intervene in Case No. 2011-00161 and Case No. 2011-00162 shall be collectively referred to as "Individual Petitioners."

have failed to establish that they have a special interest in this proceeding. KU and LG&E note that the Individual Petitioners' interest concerns the financial impact on their monthly bills as a result of the companies' environmental compliance plans. KU and LG&E argue that the proffered interest does not constitute a special interest that is distinct from any other KU or LG&E customer. Moreover, KU and LG&E point out that the AG, who has been granted intervention in these matters, is statutorily charged with representing the interests of all utility customers, including the Individual Petitioners herein and all other NRDC and Sierra Club members who are also customers of KU and LG&E.

KU and LG&E assert that the Individual Petitioners' expressed interest in the public health and environmental effects of the companies' decisions cannot constitute a special interest because neither public health nor the effects of the companies' pollution control projects are within the scope of the instant proceedings.

KU and LG&E further argue that the Individual Petitioners have failed to demonstrate that they will present issues or develop facts that would assist the Commission in fully considering this matter without unduly complicating or disrupting the proceedings.

With respect to the Sierra Club and NRDC, KU and LG&E contend that the environmental groups have not established a special interest in these proceedings that is not already represented by another party to these actions. In particular, KU and LG&E argue that the interests of the Sierra Club and the NRDC in promoting energy efficiency, demand response, renewable energy, and cost-effective low-carbon energy resources are outside the scope of these proceedings, which involve a determination of

whether the proposed environmental compliance plans are reasonable and cost-effective pursuant to KRS 278.183, and whether the requests for CPCNs are needed and do not result in wasteful duplication pursuant to KRS 278.020(1).

KU and L&GE also contend that the Sierra Club and NRDC have failed to demonstrate that they will be capable of presenting issues or developing facts that will assist the Commission in considering these proceedings. KU and LG&E note that the Sierra Club and NRDC have failed to demonstrate the required expertise in environmental compliance and CPCN proceedings governed by KRS 278.183 and KRS 278.020, respectively. They further note that, if permitted to intervene, the Sierra Club and NRDC would only advocate for their interests in renewable energy and low-carbon generation sources, which interests are beyond the scope of these proceedings.

Lastly, KU and LG&E argue that permitting the Sierra Club and NRDC, through intervention, to "advance their environmental policy positions" would unduly complicate and disrupt these proceedings because such issues are beyond the scope of the Commission's review in these proceedings.

The Sierra Club, NRDC, and the Individual Petitioners subsequently filed a joint reply in support of their petition to intervene. They argued that their stated interest is in the promotion of full examination of the proposed pollution control projects and its alternatives to ensure that the environmental compliance sought to be approved by KU and LG&E is the most cost-effective option. Petitioners reiterated that their interests are not adequately represented by the AG, given that the AG has to balance the interests of all classes of ratepayers and the AG's objectives may depart from that of the Petitioners. Lastly, the Sierra Club and NRDC state that they "have been extensively

involved in reviewing and commenting on the proposed regulations, have evaluated what type of retrofit upgrades utilities would need to install to comply with each of these compliance obligations, and have continually tracked regulatory updates impacting coal-fired utilities for multiple years.” Thus, the Sierra Club and NRDC contend that they “bring an unparalleled comprehension of these issues to this proceeding.”

#### DISCUSSION

Having reviewed the pleadings and being otherwise sufficiently advised, the Commission finds that the only person who has a statutory right to intervene in a Commission case is the Attorney General, pursuant to KRS 367.150(8)(b). Intervention by all others is permissive and is within the sound discretion of the Commission.<sup>3</sup>

In the recent unreported case of *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App., Feb. 2, 2007), the Kentucky Court of Appeals ruled that “the PSC retains the power in its discretion to grant or deny a motion for intervention,” but that this discretion is not unlimited. The Court then enumerated the limits on the Commission’s discretion in ruling on motions for intervention; one arising under statute, the other arising under regulation. The statutory limitation, KRS 278.040(2), requires that “the person seeking intervention must have an interest in the ‘rates’ or ‘service’ of a utility, since those are the only two subjects under the jurisdiction of the PSC.”<sup>4</sup>

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<sup>3</sup> *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

<sup>4</sup> 2007 WL 289328, at 3.

The regulatory limitation is set forth in 807 KAR 5:001, Section 3(8), which requires a person to demonstrate either (1) a special interest in the proceeding which is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

In analyzing the instant petition to intervene, we find that while the Individual Petitioners are customers of either KU or LG&E, neither the Sierra Club nor the NRDC is a customer of either utility. Thus, the Individual Petitioners have the requisite statutory interest in the rates and service of KU or LG&E, but the NRDC and Sierra Club lack that interest on their own behalf. However, the NRDC and Sierra Club do request to intervene on behalf of members of their respective organizations who are KU and LG&E customers. To the extent that the NRDC and Sierra Club, along with the Individual Petitioners, seek to address issues that impact the rates or service of KU and LG&E, such as whether the proposed environmental compliance plans offered by the utilities are reasonable and cost-effective, those issues are within the scope of the Commission's jurisdiction and these proceedings. Thus, the Individual Petitioners, and the NRDC and Sierra Club as representatives of their members who are customers of KU or LG&E, have an interest in the rates and service of KU and LG&E and in these proceedings, and that interest is sufficient to satisfy the statutory limitation for intervention under KRS 278.040(2).

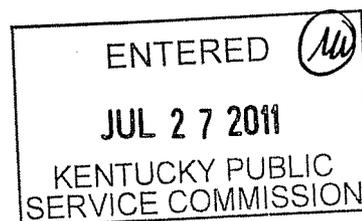
With respect to the regulatory limitation upon intervention as set forth in 807 KAR 5:001, Section 3(8), the Commission is not persuaded by Petitioners claims that they have a special interest that is not otherwise adequately represented. While Petitioners

certainly have an interest in promoting energy efficiency and renewable energy resources, they have not established how their interest in these issues differs from the interest of all other KU and LG&E customers or how the AG's representation is not adequate to protect their interest.

The Commission is, however, persuaded that the NRDC and Sierra Club, acting on behalf of their Kentucky members, do possess sufficient expertise on issues that are within the scope of these environmental compliance proceedings, such as whether the compliance plans proposed by KU and LG&E are reasonable and cost-effective in light of a full range of available alternatives. The Commission notes that the NRDC and Sierra Club have intervened in similar proceedings in other states and that Petitioners are represented by experienced counsel. Therefore, the Commission finds that intervention by Petitioners is likely to present issues or develop facts that will assist in the review of the KU and LG&E environmental compliance plans without unduly complicating or disrupting the review.

IT IS THEREFORE ORDERED that the petition for full intervenor status filed by Petitioners is granted.

By the Commission



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